FILED
APR 17 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1540

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PARTIDO NUEVO PROGRESISTA, *Petitioner,*

v.

GERINELDO BARRETO PEREZ, ADMINISTRATOR,
PUERTO RICO ELECTIONS COMMISSION,
AND
PARTIDO POPULAR DEMOCRATICO, *Respondents.*

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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April 17, 1981

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Petitioner Partido Nuevo Progresista submits this reply to the Brief in Opposition to Petition for Certiorari filed by respondent Partido Popular Democratico on April 8, 1981 (hereinafter "PPD Br.").

1. Respondent PPD persistently mischaracterizes petitioner's civil rights action as an attempt "to override the Supreme Court of Puerto Rico's interpretation of local law." PPD Br. 11; *see also id.* at 1-3, 12, 15-16. That is not so. Petitioner has never argued that the Supreme Court of Puerto Rico is not the final judicial authority on the construction of Puerto Rico law.

In accordance with the Supreme Court of Puerto Rico's judgment of December 2, 1980, it is now conclusively settled, as a matter of local law, that mismarked ballots "in which the intention of the elector may be inferred" are valid and may be "count[ed] as correctly cast." (Petn. App. 86a) This decree authoritatively supplants the explicit command of Article 1.033(b) of the Puerto Rican Electoral Law of 1977 that mismarked ballots "shall be null and void, and deemed unmarked." (Petn. App. 42a) The issue in this case is not whether the Puerto Rico Supreme Court's decision should be overturned as erroneous under Puerto Rico law.[1] The issue is whether the undoubted post-election *change* in local electoral law brought about by the Supreme Court's decision has resulted in a fundamentally unfair election in violation of the Due Process Clause. Where a post-election change in local law alters the outcome of an election, petitioner submits that a due process remedy should be available. Petn. for Cert. 12-13.

Respondent PPD acknowledges that its alternative *res judicata* argument can have force only if petitioner's suit is "considered" to rest on "a contention that the Supreme Court of Puerto Rico erred in its construction of the Puerto Rico statute." PPD Br. 15-16. Because such a view of petitioner's due process claim is erroneous, this Court (like the court of appeals below) may decide this case on its constitutional merits. *See also* Petn. for Cert. 13 n.9.

2. Petitioner does not understand respondent PPD's murky defense of the due process holding in *Snowden* v. *Hughes,* 321 U.S. 1 (1944). PPD Br. 7 n.8. This case

[1] The finding of a due process violation in this case would leave intact the Puerto Rico Supreme Court's interpretation of local electoral law.

presents the issue whether the Due Process Clause is one of "the special, fundamental federal guarantees" (*id.*) that, respondent PPD concedes, may provide the basis for federal intervention into state electoral matters. *Snowden* held the Due Process Clause unavailable; petitioner submits that that holding should be re-examined and overruled. Petn. for Cert. 6-10.

Snowden's teaching that a violation of state law, standing alone, does not give rise to a federal cause of action (PPD Br. 6-8) is a truism not disputed in this case. As petitioner has pointed out (Petn. for Cert. 12-13), not every election irregularity can or should be viewed as a due process violation. Accordingly, it is not accurate to assert, as respondent PPD does (PPD Br. 12), that recognition of petitioner's due process cause of action would "thrust" the federal courts "into the details of virtually every election." *See Powell* v. *Power*, 436 F.2d 84, 86 (2d Cir. 1970).

3. Respondent PPD suggests that the constitutional standards applicable to petitioner's due process claim are so well "established" or "settled" that this case is undeserving of the Court's attention. PPD Br. 4-9. In part, this contention rests on two aspects of *Snowden* v. *Hughes* not at issue here: the relation between state law and federal rights (*supra*) and the need to show "intentional or purposeful discrimination" to prove an *equal protection* violation. The remainder of respondent PPD's exposition of so-called "established" doctrine amounts to little more than a fact-specific recitation of the distinctions adopted by the First Circuit in this case. Respondent PPD does not and cannot assert that this Court has addressed the proper application of the Due Process Clause in a case such as this one.

4. Respondent PPD belatedly raises the issue of petitioner's standing, which was not challenged in either court below. PPD Br. 14-15. Standing is jurisdictional, and hence not subject to waiver, only in its "minimum" constitutional dimension under Article III, which requires a showing of " 'some threatened or actual injury resulting from the putatively illegal action.' " *See Regents of the University of California* v. *Bakke,* 438 U.S. 265, 280 n.14 (1978); *Warth* v. *Seldin,* 422 U.S. 490, 498-99 (1975). The threat to petitioner's control of the Puerto Rico House of Representatives and key municipalities as a result of this election dispute (Petr. for Cert. 4-5 & n.1; PPD Br. 14) plainly satisfies Article III's requirements. Moreover, respondent PPD erroneously implies that petitioner cannot assert "representational" standing on behalf of its candidates and member-voters, who face equally patent injury. *See Warth* v. *Seldin,* 422 U.S. 490, 510-11 (1975).

CONCLUSION

For the foregoing reasons and the reasons stated in petitioner's Petition for Certiorari, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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